IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 874

THOMAS H. SWOPE AND VIRGINIA McALPINE, *PETITIONERS AND APPELLANTS BELOW,*

VS.

KANSAS CITY, KANSAS, A MUNICIPAL CORPORATION; ROY WHEAT, FRANK BROWN AND FRANK H. HOLCOMB, COUNTY COMMISSIONERS OF WYANDOTTE COUNTY, KANSAS; UNION PACIFIC RAILROAD COMPANY, A CORPORATION; AND THE MINNESOTA AVENUE, INC., A CORPORATION, *RESPONDENTS AND APPELLEES BELOW.*

BRIEF OF UNION PACIFIC RAILROAD COMPANY, RESPONDENT (APPELLEE BELOW), IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

UNION PACIFIC RAILROAD COMPANY,
Respondent.

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The petitioners contend that the Circuit Court of Appeals for the Tenth Circuit erred in affirming the decision of the District Court for the District of Kansas, holding:

(a) That there had been no abandonment by Kansas City, Kansas, of the tract of land dedicated as a Public Levee in 1859.

(b) Hence no reverter of the land to the petitioners as heirs of some of the original dedicators.

Petitioners' contention is that while the city has erected and is maintaining on this land whose area is in excess of 105 acres an adequate wharf for river shipping, a forfeiture should be declared because the city has also erected and leased under statutory authority a large river and rail terminal grain elevator, connected with the wharf by overhead grain carrier, a cold storage and ice manufacturing plant, a food terminal or wholesale market for the handling of agricultural products, railroad tracks to serve these municipally owned facilities, all being connected by rail and paved highways with the wharf, and all being found by the trial court to "constitute individually and as a whole facilities for use in interstate commerce by highway, rail and water transportation," (Finding 11, Record 25).

The plat, which was filed by the founders of the town, in so far as it covers the tract in controversy, was introduced as plaintiff's Exhibit 1, and appears at page 55 of the record. It will be noted from the plat that the area in controversy is designated by the single word "Levee." The language of the dedication which appears in the same exhibit is as follows:

> "Public ground. The levee extending from the northern boundary of the Ferry Tract to the northern boundary of the town, and from the front lots to the rivers."

An examination of the original plat (R. 55) and a comparison of the original levee area, as there shown, with plaintiffs' Exhibit No. 4 (R. 77) shows that the present area of river frontage now used as or open and available for wharfage uses is not greatly less than the entire area of the levee as originally platted.

The basic contention of the petitioners has been that the term "levee" is synonymous with "landing"; that any use of any portion of the immense area which has grown up through

the process of accretion must be confined to the loading and unloading of freight and the reception and discharge of passengers to and from vessels in the adjacent navigable waters.

THE USES "NAMED, EXPRESSED OR INTENDED" IN A DEDICATION IS A QUESTION OF LOCAL LAW TO BE DETERMINED BY DECISIONS OF THE COURTS OF THE STATE WHERE THE LAND LIES.

Each dedication of property for public purposes, whether made by deed or by the filing of a plat, constitutes a conveyance of an interest in land. Determination of the law applicable to conveyances of land has throughout the history of the common law been peculiarly a local question to be settled by the courts of each state. The *lex loci rei sitae* has always governed.

In the early case of *United States v. Crosby*, 7 Cranch 115, 3 L. Ed. 287, it was held "The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situated." In another early case, *Keer v. Moon*, 9 Wheat. 565, 569, 6 L. Ed. 161, the Court said:

> "It is an unquestionable principle of general law, that the title to and the disposition of real property, must be exclusively subject to the laws of the country where it is situated."

In *DeVaughn v. Hutchinson*, 165 U.S. 566, 41 L. Ed. 827, the Court thus stated the principles which very appropriately must govern in the consideration of the present case:

> "It is a principle firmly established that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances. *United States v. Crosby*, 7 Cranch 115;

Clark v. Graham, 6 Wheat. 577; *McGoon v. Scales,* 9 Wall. 23; *Brine v. Insurance Co.,* 96 U. S. 627."

The rule that the law of the state where the land is located—both statutory and as established by judicial decisions—governs in all matters relating to titles, estates and conveyances of land has been uniformly recognized by all courts from the very beginnings of our country. This rule was fully recognized by this Court in *Swift v. Tyson,* 16 Peters 18, 10 L. Ed. 871.

Erie R. R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, which overruled *Swift v. Tyson* as to the application of the local law in other matters, announced no new principle in so far as the law relating to real estate is concerned.

THE DISTRICT COURT AND THE CIRCUIT COURT OF APPEALS RIGHTLY APPLIED THE ESTABLISHED LAW OF KANSAS AS TO THE USES "NAMED, EXPRESSED OR INTENDED" IN A DEDICATION OF THIS CHARACTER.

Applicable Kansas Supreme Court decisions and the rules of law established thereby are set out in the trial court's finding of fact No. 12. (R. 25.)

The petitioners contend that the Kansas decisions (particularly *McAlpine v. Railway Co.,* 68 Kan. 207, 75 Pac. 73, and *Kansas City v. Woods,* 117 Kan. 141, 230 Pac. 79) have been misconstrued and misapplied by the courts below.

Both of these cases had to do with the scope of authorized uses of this very levee. The McAlpine case was brought by ancestors of the present petitioners, plaintiffs below. There is a lot of discussion in the McAlpine case about what constitutes such an abandonment as would bring about a reversion of property dedicated to public uses. We can find nothing

in that discussion itself, however, which supports the contention of petitioners that there has now been an abandonment. This is completely refuted by the trial court's finding No. 8 in the present case that the city has provided:

> "(a) A wharf or loading and unloading dock for boats, which is, so far as the evidence discloses, adequate for the present needs of river transportation" (R. 23).

The petitioners do not challenge this finding of the trial court. A study of the opinion shows that the real basis for the decision in the McAlpine case was that:

> "While a levee is a place for the landing of boats and commerce, it is much more than that" (68 Kan. 212).

The court held that the use then being made of the levee was within the purposes of the dedication. Following the assertion that the dedication was for "much more" than a boat landing, the Court, in the McAlpine case, enters upon its discussion of the question of what would constitute an abandonment. This discussion is prefaced by the following:

> "Giving to the word 'levee' the narrow construction contended for by plaintiffs (a construction which the court had already rejected), we proceed to inquire if the conclusion that there has been an abandonment and consequent reverter is warranted by the facts" (68 Kan. 212).

The Court then, after setting out a number of authorities, says on page 216:

> "There is nothing to be found in the evidence which goes to show that the use of the tract in question, *even were it limited to a boat landing* (a limitation which the court had already rejected), has become impossible; indeed the evidence shows to the contrary." (Emphasis ours.)

The Court then holds that there has been no abandonment, winding up the opinion with the following language:

> "that in this case no such condition was shown by plaintiff's evidence, *even if we take the narrow view that the dedication was only for the purpose of affording a landing-place for boats and for commerce carried on by river. We are further of the opinion that this narrow view may not be sustained—that the dedication was for other purposes as well;* and it may well be doubted that a reverter would necessarily follow the complete drying up of the Missouri River." (Emphasis ours.)

We therefore submit that the Kansas Supreme Court in the McAlpine case has given a binding construction of the intention of the dedicators of this levee property and that under this construction the levee property is "much more" than a boat landing and that, "the dedication was for other purposes as well."

It cannot be questioned that the Court held in *Kansas City v. Woods, supra,* that the city was acting within its power in giving a lease for a term of years, and the Court described the lease as follows:

> "The lease contemplates the diking the property to prevent recurrence of floods and submergence, the laying out of streets, the construction of sewers and paving, *the erection of industrial plants and warehouses,* and the construction of facilities for any river traffic which may materialize during the term of the lease—all consistent with and apparently helpful to and promotive of the use of the property as a public levee." (Emphasis ours.)

Of course, the present petitioners were not parties to that suit. Hence the principle of *res adjudicata* does not apply. If the petitioners were litigating the present case in the courts of Kansas, they might conceivably get the Kansas court to

reexamine the questions passed upon in *Kansas City v. Woods.* However, these petitioners elected to file their present suit in a federal court, a tribunal which is bound by the decision of the Kansas Supreme Court, on a somewhat different principle—the principle of *lex loci rei sitae,* and the similar principle announced by the Court in *Erie Railroad Company v. Tompkins,* 304 U.S. 64.

These decisions of the Kansas Supreme Court establish general principles of law. The Court had jurisdiction of the subject matter. In any later case in the federal courts, such as the case now before this Court, these general principles are binding pronouncements of the law of Kansas, whether or not the parties who seek to litigate similar questions in the federal courts were parties to the case in which the principles were announcd. If similar questions should later arise as to public levees in the cities of Leavenworth or Atchison, the previous decisions of the Kansas Supreme Court determining what uses a city might make of a tract of ground marked "levee" on a dedication plat, and dedicated as "Public Grounds," would stand as the settled law of the State of Kansas binding upon the parties to the Leavenworth or the Atchison case, certainly so if the suit be brought in the federal court.

If these earlier Kansas Supreme Court decisions have, as we contend, settled principles of law which defeat the petitioners' case, they are binding on the petitioners as well as on all future litigants, at least when the parties choose the federal courts as their forum, and there is then no question of constitutional law involved.

Is the vast acreage not presently needed for the narrow use which petitioners have in mind and which the Kansas Supreme Court has held does not measure the city's rights to be left idle and unused? Or is the city, with the approval of the legislature, justified in authorizing the use of this ex-

cess acreage for purposes which the city and the legislature, with the sanction of the highest court of the state, have deemed reasonably incidental to the strict and narrow use contended for by petitioners—the city always having the right to remove its lessees from the premises whenever public necessity may require? The question has been answered by the Kansas Supreme Court.

The trial court and the Circuit Court of Appeals correctly applied the law of Kansas. The petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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Respondent

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